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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MIRIAM WILSON, NADINE SCHNURSTEIN, RONALD BARROW, GLORIA ABBEY-LYLES and PATRICIA VADER,

Petitioners,

v.

MICHAEL LANE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Must this Court establish a uniform test to determine the validity of a death row inmate's waiver of post-conviction review of his conviction and death sentence that conforms with the standards used to test waivers of other constitutional rights?

2. Would the Seventh Circuit's failure to evaluate any prudential considerations in favor of finding that Petitioners have individual standing to challenge the constitutionality of the Illinois death penalty statute violate this Court's precedent and permit an execution under a statute of highly suspect validity before full review by the courts?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Miriam Wilson, Nadine Schnurstein, Ronald Barrow, Gloria Abbey-Lyles, and Patricia Vader, individually and as next friends acting on behalf of Charles Walker, and the Respondent, Michael Lane, Director of the Illinois Department of Corrections.

These same parties are the Petitioners and Respondent, respectively, before this Court.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Miriam Wilson, Nadine Schnurstein, Ronald Barrow, Gloria Abbey-Lyles and Patricia Vader respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on March 15, 1989. Alternatively, Petitioners respectfully request this Court to reserve action on this matter pending the disposition of *Whitmore v. Arkansas*, No. 88-7146 (U.S., July 3, 1989), for which this Court recently granted *certiorari* and which Petitioners understand raises similar issues concerning next-friend standing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 870 F.2d 1250, and is reprinted in the Appendix hereto at page A-1, *infra.*

The order of the Court of Appeals for the Seventh Circuit denying Petitioners' Petition for Rehearing With Suggestion For Rehearing *En Banc*, dated April 18, 1989, is reprinted in the Appendix hereto at page B-1, *infra.*

The memorandum opinions and orders of the United States District Court for the Southern District of Illinois are reported at 697 F. Supp. 1489 and 697 F. Supp. 1500 and are reprinted in the Appendix hereto at pages C-1 and D-1, *infra*, respectively.

JURISDICTION

Petitioners brought this suit in the District Court, invoking the court's jurisdiction under 28 U.S.C. §§1343(c) and 2241, *et seq.* On April 19 and August 26, 1988, the District Court entered orders denying the Petitioners individual and next-friend standing, respectively. *See* pp. C-1 and D-1, *infra.*

Petitioners appealed to the Seventh Circuit Court of Appeals from the District Court's rulings, invoking jurisdiction under 28 U.S.C. §1291. The Seventh Circuit affirmed the orders of the District Court on March 15, 1988. *See* p. A-1, *infra.* On March 29, 1989, Petitioners filed a timely Petition For Rehearing With Suggestion For Rehearing

En Banc. On April 18, 1989, the Seventh Circuit denied the petition for rehearing. *See* p. B-1, *infra*.

On April 24, 1989, Petitioners filed a motion to stay the issuance of the mandate with the Seventh Circuit pending *certiorari* proceedings. On May 1, 1989, the Seventh Circuit stayed issuance of the mandate until June 1, 1989. On May 24, 1989, Petitioners filed a motion to continue the stay of issuance of the mandate. On May 26, 1989, the Seventh Circuit denied the motion without comment. On May 30, 1989, Petitioners filed an application to stay issuance of the mandate with the Clerk of the Supreme Court. Justice Stevens, as Circuit Justice for the Seventh Circuit, granted the stay of the mandate pending *certiorari* proceedings on June 1, 1989.

Petitioners invoke the jurisdiction of this Court to review the judgment and order of the Seventh Circuit under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §2242. Application for Writ of *Habeas Corpus*.

Application for a writ of *habeas corpus* shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a Justice thereof or a circuit judge, it shall state the reasons for not making application to the district court of the district in which the applicant is held.

STATEMENT OF THE CASE

Petitioners brought this action against Respondent Michael Lane, director of the Illinois Department of Corrections, for themselves and on behalf of Charles Walker, currently an inmate on death row at the Menard Correctional Center in Chester, Illinois, pursuant to 28 U.S.C. §§1343, 2241 *et seq.*, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. In November, 1983, Mr. Walker pleaded guilty in the Circuit Court of St. Clair County, Illinois, to two counts of murder and one count of armed robbery. Following a jury sentencing hearing, during which he emotionally asked the jury to spare him from execution, the court sentenced Mr. Walker to death on the murder counts and to a term of 30 years on the armed robbery count. On December 20, 1985, the Illinois Supreme Court affirmed Mr. Walker's conviction and death sentence on direct appeal. *See People v. Walker*, 109 Ill.2d 484, 488 N.E.2d 529 (1985).

On December 1, 1986, this Court denied Mr. Walker's petition for a writ of *certiorari*. *Walker v. Illinois*, 107 S.Ct. 598 (1986), *reh'g denied*, 107 S.Ct. 913 (1987). During the direct appeal process, and after being confined to the death row unit at Menard, Mr. Walker informed his appointed counsel that he wanted to make no further legal challenges to his conviction and death sentence and that

he desired to be executed. Mr. Walker continues to express a desire to forego further legal efforts on his behalf and to be put to death.

On January 22, 1987, the Illinois Supreme Court was requested to order a hearing for the determination of whether Mr. Walker was mentally competent and whether his waiver of further legal proceedings was voluntary. The Illinois Supreme Court subsequently directed the Circuit Court of St. Clair County to conduct a hearing to determine: (1) whether Mr. Walker is mentally competent to waiver further legal efforts on his behalf; (2) whether he is making a knowing and intelligent waiver of his constitutional right to further challenge his sentence; and (3) whether he is fit to be executed. Significantly, the Illinois Supreme Court did not order a determination of the voluntariness of Mr. Walker's waiver of further legal efforts on his behalf, despite being requested to do so.

After a hearing, the Circuit Court of St. Clair County ruled that Mr. Walker is mentally competent to waive further legal efforts on his behalf and that he is fit to be executed. At that hearing, however, Mr. Walker's appointed counsel argued, as did the State, that Mr. Walker is mentally competent and fit to be executed. Thus, no evidence was presented that Mr. Walker is mentally incompetent or that his waiver of further legal efforts on his behalf is involuntary, although such evidence certainly existed at that time. This evidence included Mr. Walker's long history of alcohol abuse and the possibility of resulting brain damage, his lung disease, his dramatic change in attitude from a strong desire to live to an expressed desire to die, and his fear for his safety if he is placed in the general prison population should his sentence be changed from death to life imprisonment.

Because Mr. Walker's appointed counsel did not oppose the State's position that Mr. Walker is competent and fit to be executed, the Illinois Supreme Court directed the Circuit Court of St. Clair County to conduct another hearing to determine Mr. Walker's mental competence. The Illinois Supreme Court appointed counsel and a "guardian *ad litem*" for Mr. Walker and ordered that evidence be presented on both sides of the competency issue. After a hearing at which such evidence was introduced, the Circuit Court found Mr. Walker to be mentally competent to waive further legal actions on his behalf. Significantly, the Circuit Court did *not* make a specific finding that Mr. Walker's waiver of his rights to further legal challenges to his sentence is voluntary, despite being requested ~~to do so~~ by Mr. Walker's appointed counsel. The Illinois Supreme Court's order directing the Circuit Court to conduct a competency hearing had not listed the voluntariness of Mr. Walker's professed desire to waive further legal proceedings as an issue for the Circuit Court's consideration. As a result, the Circuit Court did not receive or consider such evidence. Nevertheless, on January 19, 1988, the Illinois Supreme Court found Mr. Walker fit to be executed and set an execution date of May 10, 1988.

After the Illinois Supreme Court set an execution date for Mr. Walker, Petitioners, Mr. Walker's personal friends, filed a next-friend habeas corpus petition on Mr. Walker's behalf pursuant to 28 U.S.C. §2242. In their petition, Petitioners raised two claims and offered separate and independent standing arguments to support each claim. First, Petitioners challenged the validity of the Illinois death penalty statute, Ill. Rev. Stat. ch. 38, ¶9-1, *et seq.*, asserting individual citizen standing to wage such a challenge. Second, Petitioners contended that the conditions of Mr.

Walker's confinement on death row since his incarceration in 1984 violate the First, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and that these conditions, coupled with the effects of chronic alcoholism, have caused Mr. Walker to involuntarily waive further review of several meritorious issues regarding the manner in which his guilty plea was obtained and the method by which he was sentenced to death. In this second claim, Petitioners assert next-friend standing on behalf of Mr. Walker based on the close personal relationship each Petitioner has developed with Mr. Walker, not in their individual capacities.

On April 19, 1988, following the initial hearing of Petitioners' habeas petition, the District Court entered an order: (1) dismissing Petitioners' constitutional challenge to the Illinois death penalty statute for lack of individual standing; and (2) requiring discovery and a hearing on whether Mr. Walker lacked the capacity to voluntarily waive his constitutional rights to post-conviction review of his death sentence. By ordering a hearing on capacity only, the District Court rejected Petitioners' argument that the conditions of Mr. Walker's confinement could render his waiver involuntary. In addition, the District Court limited the evidentiary inquiry to whether Mr. Walker's decision to waive post-conviction review demonstrates a flawed mental state resulting from an overborne will. *See* p. D-1, *infra.*

On August 8, 1988, the District Court heard testimony from two expert witnesses as to whether or not Mr. Walker's decision not to further appeal his death sentence is the result of an overborne will. Following that hearing, the District Court, in a memorandum opinion and order dated August 26, 1988, adopted the findings of the court-appointed expert who found that Mr. Walker did not

suffer from an overborne will and rejected the finding of Petitioners' expert who concluded that Mr. Walker's waiver decision was indeed involuntary. Consequently, the District Court concluded that Mr. Walker's waiver was voluntary and dismissed the remainder of Petitioners' habeas petition for lack of standing to assert Mr. Walker's post-conviction remedies on his behalf. *See* p. C-1, *infra.*

Petitioners appealed the District Court's rulings to the United States Court of Appeals for the Seventh Circuit. First, Petitioners challenged the District Court's ruling that they lack individual standing to challenge the constitutionality of the Illinois death penalty statute. Second, Petitioners challenged the District Court's decision to equate an involuntary waiver with the standard of an "overborne will" and the District Court's subsequent finding that Mr. Walker's waiver of his post-conviction rights was not the product of an overborne will, and thus was voluntary. Petitioners invoked the Seventh Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions of district courts."

On March 15, 1989, the Seventh Circuit issued its opinion adopting the District Court's rulings concerning these issues. First, the Seventh Circuit affirmed the District Court's ruling that Petitioners do not possess next-friend standing to petition for a writ of habeas corpus on behalf of Charles Walker pursuant to 28 U.S.C. §2242. In so holding, the Seventh Circuit affirmed the standard applied by the District Court to determine the voluntariness of Mr. Walker's decision to waive further legal challenges to his conviction and death sentence. The District Court had limited its waiver analysis to "whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to abandon further relief involuntary." *See* p. A-4, *infra.* To this end,

the courts below ruled that only a lack of mental capacity can render a waiver involuntary. These holdings failed to account for waiver decisions made in a knowing and intelligent fashion, but which are nonetheless involuntary because they are influenced by improper factors.

The Seventh Circuit also affirmed the District Court's holding that Petitioners do not have individual standing to challenge the execution of Charles Walker under the Illinois death penalty statute. The Seventh Circuit affirmed the District Court's ruling on the ground that Petitioners "can point to no genuine obstacle preventing Charles Walker from asserting his own claims. . . ." *See* p. A-11, *infra*. The Seventh Circuit relied upon *Singleton v. Wulff*, 428 U.S. 106 (1976), for the proposition that the prudential limitation against a litigant asserting the legal rights of a third party applies when the third party can assert his own rights. The Seventh Circuit therefore held that Petitioners do not have individual standing to challenge Mr. Walker's death sentence. *See* p. A-11, *infra*. The Seventh Circuit's holding improperly narrowed the focus of inquiry to only one factor relevant to prudential standing considerations. Specifically, the court below considered only the impact of the voluntariness of Mr. Walker's waiver on the issue of individual standing. A broader inquiry, which analyzes *all* the prudential standing considerations, heavily favors Petitioners' individual standing to challenge Mr. Walker's death sentence.

One of the considerations which Petitioners advanced in support of their individual standing was the dubious constitutionality of the Illinois death penalty statute. Indeed, after the Seventh Circuit issued its opinion, a federal district court in another case ruled that the Illinois death penalty statute is unconstitutional for allowing the arbitrary and capricious imposition of the death penalty.

See United States ex rel. Silagy v. Peters, No. 88-2390 (C.D. Ill., April 29, 1989), 1989 U.S. Dist. LEXIS 5724. Accordingly, Mr. Walker would now be "volunteering" for execution under a death penalty statute that has been held unconstitutional.

On April 18, 1989, the Seventh Circuit, without comment, denied Petitioners' petition for rehearing with suggestion for rehearing *en banc*. *See* p. B-1, *infra*. The Seventh Circuit stayed the issuance of the mandate to and including June 1, 1989, but subsequently denied Petitioners' motion to continue the stay of the mandate beyond that date. However, on June 1, 1989, Justice Stevens, as Circuit Justice for the Seventh Circuit, allowed Petitioners' application to stay the mandate pending this Court's action on this petition for a writ of *certiorari*.

REASONS FOR GRANTING THE WRIT

I.

This Court must establish a uniform test to determine the validity of a death row inmate's waiver of post-conviction review that conforms with the standards used by this Court and other circuits to determine the validity of similar waivers and waivers of other constitutional rights.

This case raises important and unique legal issues arising from Charles Walker's expressed desire to waive further legal remedies and proceed to his execution under a death penalty statute recently held unconstitutional by

a federal district court. *See United States ex rel. Silagy v. Peters*, No. 88-2390 (C.D. Ill., April 29, 1989), 1989 U.S. Dist. LEXIS 5724. The voluntary waiver issue raised by Petitioners' next-friend petition for a writ of habeas corpus will only become more significant and common as the nation's death row population increases. Accordingly, this Court must establish a uniform standard for determining the voluntariness of a death row inmate's waiver of the legal remedies available to him to challenge his conviction and death sentence.

The lower courts erred in determining that Charles Walker voluntarily waived his right to post-conviction review, and thus may voluntarily proceed to his execution, by evaluating only whether his decision resulted from a deficient mental capacity, and not whether his decision resulted from undue influences or improper factors. Specifically, the District Court failed to inquire into whether Mr. Walker's waiver decision, although not the result of a mental disease or defect, was not a voluntary decision within the meaning of the law because of improper influences on that decision, such as intolerable conditions of confinement on death row at the Menard Correctional Center. The District Court limited its waiver analysis to "whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to forego further relief involuntary." *See* p. C-19, *infra*.

The Seventh Circuit affirmed that decision and specifically rejected the distinction between a competent decision and a voluntary waiver, a distinction recognized by this Court and other lower courts. Specifically, courts must examine *all* of the circumstances surrounding an individual's waiver decision, not just the individual's mental capacity. This Court has recognized that involuntary

waiver decisions can result from the undue influence of improper factors, even when the individual's mental competency or capacity may not otherwise be in dispute. *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936). By ignoring the distinction between competency and voluntariness, the lower courts contravened *Johnson v. Zerbst*, 304 U.S. 458 (1938), and failed to account for waiver decisions made in a knowing and intelligent fashion, but which are nonetheless involuntary because they are influenced by improper factors.

Most of this Court's decisions that address the voluntariness of a waiver of constitutional rights have involved such issues as the right to a trial by jury, the right against self-incrimination, the right against an unlawful search and seizure, and the entry of a guilty plea. This Court has scrutinized decisions in these areas under a factual analysis that examines the "totality of circumstances" involved in a particular case. *See Mincey v. Arizona*, 437 U.S. 384, 399 (1978) (totality of circumstances used to assess voluntariness of confession made without Miranda rights being provided); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (totality of circumstances used to assess the voluntariness of a consent to a search); *Haynes v. Washington*, 373 U.S. 503 (1963) (totality of circumstances used to assess voluntariness of waiving the right against self-incrimination); *VonMoltke v. Gillies*, 332 U.S. 708 (1948) (totality of circumstances used to assess voluntariness of guilty plea and waiver of the right to counsel). In *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961), this Court specifically held that a confession brought about by improper influences constituted involuntary behavior. Thus, this Court has established that improper influences can render a decision to waive a constitutional right involuntary and that the gravity of the impropriety depends upon the particular factual circumstances of each case.

In the instant case, Charles Walker has expressed a desire to waive his right to post-conviction review of his guilty plea and the death penalty imposed on him by the state trial court. The voluntariness of his decision to waive further legal remedies, and thus to forego life itself, can be no less significant a constitutional issue than the voluntariness of a decision to enter a guilty plea or to waive the right to counsel. The right to seek post-conviction relief is one of the most significant constitutional privileges guaranteed to American citizens. *See Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Moreover, the importance of examining the voluntariness of such a waiver in the context of a death sentence should be beyond dispute. Thus, the test of voluntariness should be as vigorous in the death penalty context as it is in other contexts.

The Seventh Circuit's decision also directly conflicts with the Eighth Circuit's decision in *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir.), *cert. denied*, 107 S.Ct. 3277 (1987). In *Smith*, the Eighth Circuit recognized that voluntariness was not merely a question of the absence of a mental defect or disease, but involved a further evaluation of whether any improper factors influenced an otherwise apparently rational decision. In *Smith*, next-friend petitioners sought to intervene on behalf of a death row inmate who expressed a desire to waive further review of his conviction and death sentence. In analyzing the issue of whether the inmate's decision to waive further post-conviction review was voluntary, the Eighth Circuit applied a two-prong test:

> This inquiry resolved into two questions: first, whether Smith had the capacity to appreciate his position and make a rational decision, or was suffering from a mental disease, disorder or defect that substantially affected his capacity, *see Rees v. Payton*, 384 U.S. 312, 314 (1966); and second, whether the conditions

> of his confinement rendered his decision involuntary. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 953, 957, 961 (M.D. Tenn. 1984).

Smith, 812 F.2d at 1053. The Eighth Circuit thus held that, in addition to examining mental capacity, a court assessing the validity of a waiver of post-conviction remedies must decide whether improper influences, such as confinement conditions, rendered the inmate's waiver involuntary. *Smith*, 812 F.2d at 1053.

Groseclose ex rel. Harries v. Dutton, 594 F. Supp. 949 (M.D. Tenn. 1984), comports with the Eighth Circuit's analysis and with this Court's holdings relating to waivers in other contexts. In *Groseclose*, the district court inquired into the "totality of the circumstances," including the conditions of confinement, to determine whether an inmate voluntarily waived his right to appeal. *Groseclose*, 594 F. Supp. at 949. The court concluded that the totality of the conditions on death row and their impact on the prisoner were so severe as to support third parties' next-friend habeas petition, and thus allowed the next friends to proceed with post-conviction remedies on the inmate's behalf. *Groseclose*, 594 F. Supp. at 957-62.

Similarly, in determining the voluntariness of a waiver, courts have consistently inquired into the length of time a prisoner has spent in confinement and the conditions of confinement. *See, e.g., Brooks v. Florida*, 389 U.S. 413 (1967); *Stidham v. Swenson*, 443 F.2d 1327 (8th Cir. 1971), *rev'd on other grounds and remanded*, 409 U.S. 234 (1972), *modified*, 410 U.S. 904 (1973), *remanded*, 506 F.2d 478 (1974) (en banc), *cert. denied*, 429 U.S. 941 (1976). In *Stidham*, for example, when inquiring into the voluntariness of a prisoner's confession to a murder committed during a prison riot, the court analyzed such factors as the cell

and prison conditions at the time leading up to the confession. 443 F.2d at 1331. Plainly, an inquiry into prison conditions and circumstances leading up to a purportedly voluntary waiver of post-conviction remedies and an expressed desire to be put to death should be scrutinized no less vigorously.

Moreover, this Court has implicitly recognized that the death penalty itself and its pending imposition may distort an inmate's decision making processes. *See Fay v. Noia*, 372 U.S. 391 (1963). Further, the length of the appeal and post-conviction process, during which time Mr. Walker has been held in the conditions of confinement that exist on death row at the Menard Correctional Center, certainly may have impeded Mr. Walker's voluntary exercise of his right to challenge his conviction and death sentence.

In the instant case, the District Court refused to consider any factors that may have improperly influenced Charles Walker's waiver decision, permitting inquiry solely into his mental capacity. No specific finding has been made regarding whether any improper factors influenced Mr. Walker's decision to waive post-conviction review of his guilty plea and death sentence. The case law cited above, however, requires an inquiry into the voluntariness of Mr. Walker's waiver. Such an inquiry considers the totality of the circumstances surrounding that decision, and particularly whether it resulted from improper and undue influences, such as the conditions of Mr. Walker's confinement on death row. By affirming the District Court, the Seventh Circuit contradicted well-established precedent.

In short, the lower courts improperly subsumed the issue of voluntariness under a mental "capacity" standard and failed to conduct the required thorough factual analysis.

To this end, the lower courts denied Mr. Walker the thorough review afforded to other individuals whose waiver decisions were tested in light of both internal factors that would render their decisions incompetent *and* external factors that would render their decisions involuntary.

II.

The Seventh Circuit's failure to evaluate any prudential considerations in favor of finding that Petitioners have standing to challenge the constitutionality of Illinois' death penalty statute violates Supreme Court precedent and will permit an execution under a statute of highly suspect validity before full review by the courts.

In the instant case, the Seventh Circuit affirmed the District Court's ruling that Petitioners do not have individual standing to challenge the constitutionality of Charles Walker's death sentence on the ground that Petitioners "can point to no genuine obstacle preventing Mr. Walker from asserting his own claims . . . ." *See* p. A-11, *infra.* As the sole basis for this ruling, the Seventh Circuit relied upon the prudential limitation against a litigant asserting the legal rights of a third party when the third party is able to assert his own rights. The Seventh Circuit therefore held that Petitioners do not have individual standing to challenge Mr. Walker's death sentence by attacking the validity of the Illinois death penalty statute. *See* p. A-11, *infra.*

The Seventh Circuit's ruling, however, erroneously narrows the prudential consideration analysis to only one factor, and completely ignores the considerations Petitioners set forth in their briefs, which heavily favor a finding that Petitioners have individual standing to challenge

Mr. Walker's death sentence. Petitioners have never contended that Mr. Walker's waiver of his appellate remedies was not a factor to be considered in evaluating the prudential concerns involved in asserting a third party's rights. This single factor, however, does not dispose of the entire *jus tertii* standing issue. The Seventh Circuit's ruling to the contrary conflicts with prior rulings of this Court.

Further, the Seventh Circuit's ruling will permit the State of Illinois to execute Mr. Walker before a complete review of the constitutionality of Illinois' death penalty statute by the federal courts, despite the serious questions that have been raised about the statute's validity in the Illinois Supreme Court and in local federal district courts, including a recent decision from the United States District Court for the Central District of Illinois overturning the statute. An execution under an unconstitutional statute would seriously damage the integrity of the entire criminal justice system and the public interest. The risk of an execution under an invalid statute can only be avoided by granting Petitioners standing to challenge the constitutionality of Mr. Walker's sentence.

In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court stated that the "limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill defined and speculative." 429 U.S. at 193.[1] This Court

[1] The initial standing requirement that a litigant asserting the right of a third person must satisfy is the "case or controversy" requirement of Article III of the United States Constitution. *See,*

(Footnote continued on following page)

found, however, that when the general rule against *jus tertii* standing does not further its prudential objectives, the restriction should not apply. 429 U.S. at 193-94. In determining whether a refusal to allow *jus tertii* standing will promote these prudential objectives, a court may examine a number of factors.

First, a court may examine the "relationship of the litigant to the person whose right he seeks to assert." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In examining this factor, a court should consider whether the litigant can reasonably and properly frame the issues and present them with sufficient adversarial zeal. *See, e.g., Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984). Similarly, a court should determine whether the constitutional issues at stake are sharply defined and whether the litigation is necessary or trivial. *Id.* at 955.

Another factor in evaluating the propriety of third-party standing is the nature of the right which the litigants seek to assert. In *Secretary of State of Maryland v. J.H. Mun-*

---

[1] *continued*

e.g., Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 954 (1984). A litigant may satisfy this requirement by establishing that he or she has or will suffer some "injury in fact"; that is, some "specific and perceptible harm" due to the action affecting the third person's right. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 688-89 (1973).

Although the issue of whether Petitioners were threatened with a sufficient "injury in fact" was argued before the Seventh Circuit because the District Court found that this requirement had not been met, the Seventh Circuit did not address the issue in its decision. Instead, the Seventh Circuit moved on to the second prong of the standing requirement: whether competing considerations outweigh the rationale for the general limitation against third-party standing. Petitioners therefore have not addressed the "injury in fact" requirement in their petition to this Court.

son Co., 467 U.S. 947 (1984), this Court found that the nature of the right asserted implicated such important societal and constitutional interest that this Court would "relax" the general rule against *jus tertii* standing because of the intolerable effect applying the rule might have on protecting those interests. 467 U.S. at 956 (finding that litigants had standing to assert third persons' First Amendment rights). This Court in *J.H. Munson Co.* stated that, in view of the importance of the interests the litigant sought to assert, it would allow "a party to assert the rights of another without regard to the ability of the other to assert his own claims. . . ." 467 U.S. at 956.

The instant decision does not weigh Petitioners' relationship to Mr. Walker or the important societal and judicial interests which Petitioners seek to protect against Mr. Walker's right to waive his appeals, but relies solely on Mr. Walker's ability to assert his own claims to deny Petitioners standing. This failure to engage in any assessment and balancing of factors relevant to the prudential concerns involved in evaluating *jus tertii* standing is in conflict with this Court's ruling in *J.H. Munson Co.*, which granted the litigants standing despite the fact that the third parties could have asserted their own rights. There is no "checklist" of considerations applicable to every case in which *jus tertii* standing is asserted and no single consideration can be dispositive in such cases. The Seventh Circuit's mechanistic application of one discreet factor to completely bar standing is therefore improper.

In the case at bar, the factors ignored by the Seventh Circuit heavily favor a finding that Petitioners have standing to challenge Mr. Walker's death sentence. First, the relationship Petitioners have with Mr. Walker makes it appropriate to allow them to assert Mr. Walker's right

to seek a review of the Illinois death penalty statute. Petitioners each have a direct, personal relationship with Mr. Walker. Each has first-hand knowledge of the conditions of Mr. Walker's confinement and his day-to-day existence. Further, their interests in maintaining their personal relationship with Mr. Walker and promoting a better existence for him are inextricably intertwined with Mr. Walker's right to challenge the validity of the Illinois death penalty statute in federal court. If Petitioners are not allowed to pursue this right, Mr. Walker will be executed and these interests will be completely destroyed. In view of these circumstances, and in view of the fact that Mr. Walker refuses to assert this right himself, there can be no doubt that Petitioners are the most, and they submit, the *only*, effective proponents of Mr. Walker's right.

Further, the public and judicial interests in preventing the execution of an individual pursuant to an unconstitutional statute overwhelmingly favor finding that Petitioners have standing to challenge the Illinois death penalty statute. Preventing the execution of an individual pursuant to an unconstitutional death penalty statute unquestionably involves public and constitutional interests of the highest degree. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (reflecting on the need for heightened reliability in imposition of death sentence). Justice is not served when a state executes a convicted defendant pursuant to an unconstitutional statute. The death penalty does not exist solely for the benefit of the defendant who wishes to end his own life. This punishment also exists to safeguard and vindicate the interests of society as a whole, a task which cannot be accomplished by a death penalty statute that violates the Constitution. These public and judicial interests must be considered in determining whether Petitioners have standing in the instant case.

The Seventh Circuit also failed to consider the serious doubts about the Illinois death penalty statute's constitutionality which have been expressed by both state and federal courts in Illinois. A majority of justices of the Illinois Supreme Court have at various times stated in court opinions their belief that the statute is unconstitutional. *See People ex rel. Carey v. Cousins*, 77 Ill.2d 531, 397 N.E.2d 809, 816-824 (1979) (Justices Ryan, Goldenhersh and Clark, dissenting), *cert. denied*, 445 U.S. 953 (1980); *People v. Lewis*, 88 Ill.2d 129, 430 N.E.2d 1346, 1370-1385 (1981) (Justice Simon, dissenting). Only considerations of *stare decisis*, relied upon by three of the four justices who have stated their belief that the statute is invalid, have prevented the Illinois Supreme Court from declaring the statute unconstitutional. *See Lewis*, 430 N.E.2d at 1363-1370 (Justices Ryan, Goldenhersh and Clark, concurring). Indeed, although stating that they were bound by *stare decisis*, two of these justices expressed the hope that a federal court would examine and determine the constitutionality of the statute because of its questionable validity. *Lewis*, 430 N.E.2d at 1363-1364 (Justices Ryan and Goldenhersh, concurring).

Before Petitioners filed this action in the District Court, two federal district courts in Illinois had also voiced concern over the constitutionality of the Illinois death penalty statute. In *Kubat v. Thieret*, 679 F. Supp. 788 (N.D. Ill. 1988), *aff'd*, 867 F.2d 351 (7th Cir. 1989), the court did not rule on the validity of the statute because it overturned the defendant's death sentence on the grounds of ineffective assistance of counsel at the sentencing stage of the trial. The court, however, discussed at some length what it viewed as the constitutional infirmities of the Illinois death penalty statute. *Kubat*, 679 F. Supp. at 812-13. Similarly, in *United States ex rel. Lewis v. Lane*, 656 F.

Supp. 181 (C.D. Ill.), *affirmed*, 832 F.2d 1446 (7th Cir. 1987), *cert. denied*, 109 S.Ct. 83 (1988), the court overturned the defendant's sentence without ruling on the statute, but expressed "grave doubts" about its constitutionality. 656 F. Supp. at 185.

Subsequent to the Seventh Circuit's decision in the instant case, the United States District Court for the Central District of Illinois ruled that the statute was indeed unconstitutional in the first federal decision on the statute's validity. In *United States ex rel. Silagy v. Peters*, No. 88-2390 (C.D. Ill., Apr. 29, 1989), 1989 U.S. Dist. LEXIS 5724, the court held that the Illinois death penalty statute is unconstitutional for two reasons: first, the statute contains no directions or guidelines to minimize the risk of arbitrary action by the prosecutor in requesting a sentencing hearing and, second, the statute lacks an adequate notice provision as to when the death penalty will be sought, which effects the defendant's right to effective counsel and due process.

Justices Marshall and Brennan of this Court have also questioned the constitutionality of the Illinois statute and have urged its review. In dissenting from the denials of writs of *certiorari*, these Justices questioned the extent of prosecutorial discretion allowed under the Illinois statute. *See Eddmonds v. Illinois*, 469 U.S. 894, 896 (1984) (Marshall, J., and Brennan, J. dissenting). *See also Gacy v. Illinois*, 470 U.S. 1037, 1038 (1985) (Marshall, J., dissenting) (questioning the constitutionality of the Illinois statute because of prosecutorial discretion and the burden the statute places on a defendant to prove that death is not the appropriate sentence.)

The fact that both state and federal courts have questioned the constitutionality of the Illinois statute, and the fact that the first and only federal decision on the stat-

ute's validity found it unconstitutional, should weigh heavily in favor of granting Petitioners standing in the instant case. The Seventh Circuit's decision in this case clears the way for Charles Walker's execution under a death penalty statute that has been held unconstitutional. Such an execution would undermine the entire criminal justice system by threatening the viability of mechanisms designed to safeguard constitutional rights. As argued above, the judiciary and the public have the highest interest in preventing a state from executing an individual pursuant to an unconstitutional death penalty statute. If constitutional rights are to remain protected within the criminal justice system and the integrity of the system itself is to be preserved, this public interest must take precedence over Mr. Walker's current wish to die.

These unique factual and procedural considerations presented by Mr. Walker's case weigh heavily in favor of allowing Petitioners standing to challenge the constitutionality of the Illinois death penalty statute. The Seventh Circuit, however, improperly failed to weigh these considerations. Moreover, the Seventh Circuit gave unwarranted weight to Mr. Walker's decision to waive his appeal rights by relying solely on that factor to deny Petitioners standing.

It is well-established that certain rights are not waivable and may even be asserted against the express wishes of a defendant to protect important societal and constitutional interests. *See United States v. Wright*, 627 F.2d 1300, 1030 (D.C. Cir. 1980) (court may consider insanity defense over defendant's objections); *United States v. Taylor*, 569 F.2d 448, 452 (7th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (court may appoint "stand-by counsel" to assist in defendant's representation over defendant's objections).

In capital cases, a number of state courts have refused to accept a defendant's waiver of appellate remedies under a variety of circumstances. *See, e.g., State v. Osborne,* 102 Idaho 405, 631 P.2d 187, 192-93 (1981); *People v. Chadd,* 107 Cal. Rptr. 798, 621 P.2d 837, 844-45 (*en banc*), *cert. denied,* 425 U.S. 931 (1981); *State v. Ceja,* 115 Ariz. 413, 565 P.2d 1274, 1276, *cert. denied,* 434 U.S. 975 (1975); *State v. Martin,* 243 Iowa 1323, 55 N.W.2d 258, 260-61 (1952). In fact, one state supreme court has specifically held that the public interest in preventing an unconstitutional execution outweighs an individual's right to waive his appeal. In *People v. Stanworth,* 457 P.2d 889 (Cal. 1969), the California Supreme Court overturned a convicted defendant's sentence of death despite the defendant's attempted waiver of his automatic right to post-conviction appeal. In rejecting the defendant's motion to dismiss his appeal, the court held that the public's interest in assuring a fair and just imposition of the death penalty outweighed an individual's right of waiver. *Stanworth,* 457 P.2d at 899. *See also People v. Deere,* 710 P.2d 925, 930 (Cal. 1985) (permitting a defendant to prevent his counsel from introducing mitigating evidence at the penalty phase of a capital crime trial violates the fundamental public policy against misusing the judicial system to commit a "state-aided suicide").

Further, three Justices of this Court have recognized that the public's interest in avoiding unconstitutional executions outweighs a defendant's waiver of post-conviction review. In *Gilmore v. Utah,* 429 U.S. 1012 (1976), Justice White dissented from the majority's decision to terminate the defendant's stay of execution because a court had not determined the constitutionality of the Utah death penalty statute. Justice White stated:

> I believe . . . that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment. Until the state courts have resolved the validity of the state statute, the imposition of the death penalty in this case should be stayed.

Gilmore, 429 U.S. at 1018. Justices Brennan and Marshall concurred with Justice White's dissenting opinion.[2] In view of all of these decisions, the Seventh Circuit gave unwarranted weight to Mr. Walker's waiver decision.

In conclusion, the case at bar embodies issues of paramount interest to society and the judicial system. The rights which the Petitioners seek to assert will protect these interests, and the considerations outlined above outweigh any prudential rationale against granting Petitioners standing. Petitioners therefore respectfully request this Court to grant their petition for writ of *certiorari* and find that Petitioners have individual standing to challenge Charles Walker's death sentence by attacking the constitutionality of the Illinois death penalty statute.

CONCLUSION

For these reasons, this petition for *certiorari* should be granted. If Petitioners are correct in urging that the courts below erred in their standards for determining

[2] Chief Justice Burger, in an opinion joined by Justice Powell, did not address the issue of whether a defendant may waive appeal of a death sentence, stating that the issue was not before the Court. 429 U.S. at 1017.

next-friend and individual standing, this cause should be remanded to the District Court for appropriate disposition. Alternatively, Petitioners respectfully request this Court to reserve action on this matter pending the disposition of *Whitmore v. Arkansas*, No. 88-7146 (U.S., July 3, 1989), for which this Court recently granted *certiorari* and which Petitioners understand raises similar issues concerning next-friend standing.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2886

MIRIAM WILSON, NADINE SCHNURSTEIN, RONALD BARROW, GLORIA ABBEY-LYLES, and PATRICIA VADER, individually and as next friends acting on behalf of Charles Walker,

Petitioners-Appellants,

v.

MICHAEL LANE, Director of the Illinois Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 88-3180—**William Stiehl,** *Judge.*

ARGUED DECEMBER 28, 1988—DECIDED MARCH 15, 1989

Before BAUER, *Chief Judge*, WOOD, and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* Charles Walker, a death row inmate at the Menard Correctional Center in Chester, Illinois, wants to get his execution by lethal injection over with. Petitioner-appellants Miriam Wilson, Nadine Schnurstein, Ronald Barrow, Gloria Abbey-Lyles, and Patricia Vader, however, want to fight on his behalf to the finish. The question in this case is whether they have standing to do so.

I.

Walker pleaded guilty to two counts of murder and one count of armed robbery in the Circuit Court for St. Clair County, Illinois. Following a jury sentencing hearing, the circuit court sentenced Walker to death on the murder counts and to thirty years imprisonment on the armed robbery count. On December 20, 1985, the Illinois Supreme Court affirmed Walker's conviction and death sentence.

On December 27, 1985, Walker moved to terminate further proceedings on his behalf, informing his appointed counsel that he wanted to be executed. On February 6, 1986, the Illinois Supreme Court denied Walker's motion to terminate further proceedings, and denied his counsel's petition for rehearing. Walker's counsel next filed a petition for writ of certiorari in the United States Supreme Court, in spite of the fact that Walker opposed the action and refused to sign an affidavit in support of a motion to proceed in forma pauperis. On December 1, 1986, the Supreme Court denied the certiorari petition. *Walker v. Illinois*, 107 S. Ct. 598 (1986), *reh'g denied*, 107 S. Ct. 913 (1987).

On February 19, 1987, the Illinois Supreme Court, responding to a request of counsel, remanded Walker's case to the Circuit Court for St. Clair County to determine whether Walker "(1) is mentally competent to waive further legal actions on his behalf; (2) has made a knowing and intelligent waiver of any such further legal actions; and (3) is fit to be executed." After a June 24, 1987 hearing, at which court-appointed counsel represented Walker, the circuit court ruled that Walker was mentally competent to waive further legal efforts on his behalf and that he was fit to be executed.

On September 28, 1987, however, the Illinois Supreme Court directed the circuit court to conduct another hearing on Walker's mental condition because Walker's appointed counsel at the June 24 hearing did not oppose the state's position that Walker was competent and fit for execution.

On November 20, 1987, the circuit court held the second hearing, after which it again found Walker to be both mentally competent to waive further legal efforts on his behalf and fit for execution. On January 19, 1988, the Illinois Supreme Court reviewed Walker's case and concluded "that Charles Walker is mentally competent to waive further legal actions on his behalf; has made a knowing and intelligent waiver of any such further legal actions; and is fit to be executed." Having made that determination, the Illinois high court set Walker's execution date for May 10, 1988.

On March 15, 1988, the appellants filed their next-friend habeas corpus petition pursuant to 28 U.S.C. § 2242, which provides that an "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" The petition, in which Walker refused to join,[1] consists of two claims. First, appellants challenge in their individual capacities the constitutionality of the

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[1] On April 6, 1988, Walker wrote a letter to the district court stating that he did not want anyone undertaking legal action on his behalf. The text of the letter is as follows:

> Dear Sir:
>
> In regards to the Habeas Corpus filed in my case (Cause No. 88-3180).
>
> This is to affirm that I don't want any one speaking or acting on my behalf. Before I was sentenced I had told my sister that if I was sentenced to death, that one appeal had to be filed according to law but after that I was going to stop my appeals and ask for an execution date. The conditions on death row or any place else has nothing to do with my decision. The people who signed that writ has only known me the short time I've been here.
>
> Respectfully yours.
> s/ Charles T. Walker
> Box 711 #76374
> Menard Ill 62259

Illinois death penalty statute.[2] Second, appellants assert as next-friends of Walker (and not in their individual capacities) that Walker's conditions of confinement on death row violate several constitutional provisions and that these conditions, coupled with the chronic effects of Walker's alcoholism, have caused Walker involuntarily to waive further legal efforts on his behalf.

On April 19, 1988, the district court, after conducting an initial hearing on appellants' petition, (1) dismissed appellants' constitutional challenge to the Illinois death penalty statute for lack of standing; and (2) stayed Walker's execution pending an evidentiary hearing on the issue "whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to abandon further relief involuntary." The district court then appointed an expert to perform a psychiatric evaluation of Walker. The court also appointed counsel to represent Walker and granted the parties leave to hire their own experts to perform separate evaluations.

The August 8, 1988 hearing on the question whether Walker suffers from an overborne will was, to a large extent, a battle of the experts. On one side, appellants' expert, Dr. Curtis L. Barrett, testified that Walker's chronic alcoholism had so impaired his judgment that, but for the disease, Walker would be making every effort to save his life. On the other side, the court-appointed expert, Dr. Robert E. Becker, testified that Walker's decision making was best explained by his antisocial personality, not

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[2] As the district court noted, because appellants are suing in their individual capacities and are asserting their own interests rather than Walker's (even though they presumably intend for Walker to benefit from their efforts), this claim falls outside federal habeas corpus jurisdiction, which extends only to actions brought by or on behalf of a person in custody attacking the conditions of his or her confinement. 28 U.S.C. §§ 2241, 2242. Appellants, therefore, invoke federal jurisdiction over their individual claims pursuant to 28 U.S.C. § 1343(a)(3) to the extent they are cognizable under 42 U.S.C. § 1983.

chronic alcoholism, and that Walker was mentally capable of voluntarily waiving further review of his death sentence. In the end, the district court found Dr. Becker to be "the more credible expert" who offered "a more reasonable explanation of Walker's actions." The court also was influenced by its opportunity to examine Walker on the stand. According to the court, Walker was "credible, lucid, and rational" in explaining his decision to waive further review of his guilty plea and death sentence.

Accordingly, the district court found "that petitioners' original basis for their petition, that the conditions of confinement have caused Walker's will to be overborne, rendering his decision involuntary, is without merit." The court concluded that "Walker's waiver of the right to further review was made freely and rationally" and that "under the totality of the circumstances, Walker's decision is the product of both rational intellect and unconstrained will." The court specifically found that "Walker has the capacity to knowingly waive his right to further review of his death sentence, and the same is done voluntarily." As a result, the district court denied appellants standing to pursue Walker's post-conviction remedies on his behalf.

II.

Appellants claim that the district court erred in denying them standing as individuals to challenge the constitutionality of the Illinois death penalty statute. They also argue that the court inappropriately used an "overborne will" standard to determine that Walker had waived voluntarily his constitutional right to review of his guilty plea and sentence. Finally, appellants assert that the district court's finding that Walker voluntarily waived his right to pursue post-conviction remedies was against the manifest weight of the evidence.

A.

It is well-settled that a next-friend may not file a petition for a writ of habeas corpus on behalf of a detainee if the detainee himself could file the petition. *Weber v. Garza*, 570 F.2d 511, 513 (5th Cir. 1978). A next-friend applicant, among other things, must therefore explain why the detainee did not sign and verify the petition. *Id.* at 513-14. If the next-friend cannot do so, "the court is without jurisdiction to consider the petition." *Id.* Thus, a successful attack on Walker's competency is the requisite threshold for appellants' next-friend standing. *Rumbaugh v. McKaskle*, 730 F.2d 291, 293 (5th Cir. 1984); *Lenhard v. Wolff*, 443 U.S. 1306, 1308 (1979) (Rehnquist, J., Opinion in Chambers).

In their original petition and supplement thereto, appellants asserted next-friend standing by claiming that the conditions of Walker's confinement on death row "have impeded and violated Mr. Walker's ability to freely and voluntarily exercise his constitutional rights, including his right to pursue state post-conviction and federal habeas corpus remedies." The district court examined this claim under the Supreme Court's standard in *Rees v. Peyton* for determining whether a convicted defendant is mentally competent to choose not to pursue further appeals or collateral attacks on his conviction or sentence. Under *Rees*, the court must ask

> whether [the convicted defendant] has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees, 384 U.S. 312, 314 (1966).

Although *Rees* seems to apply squarely to Walker, appellants complain that the district court, by limiting the scope of its inquiry to whether Charles Walker lacked the "capacity" to voluntarily waive his consitutional right to

post-conviction review of his guilty plea and death sentence, failed to recognize that mental competency or capacity are issues separate and distinct from the issue of voluntariness. According to appellants, "[t]he district court's exceedingly narrow standard fails to account for waiver decisions that are involuntary because they are unduly influenced by improper factors when the mental competency or capacity of the individuals making those decisions is not otherwise in dispute."

Appellants, as they did in the district court, base their claim on the Eighth Circuit's decision in *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987), in which that court divided the inquiry into a defendant's decision to forego further review into two questions:

> first, whether [the defendant] had the capacity to appreciate his position and make a rational decision, or was suffering from a mental disease, disorder, or defect that substantially affected his capacity, *see Rees v. Peyton*, 384 U.S. at 314, . . . and second, *whether the conditions of his confinement rendered his decision involuntary. See Johnson v. Zerbst*, 304 U.S. 458 . . . (1938).

812 F.2d at 1053 (emphasis added). In the district court's view, however, both *Johnson v. Zerbst* and *Rees* "confined the inquiry to Walker's competence or capacity to terminate his pursuit of judicial remedies," not to the specific causes for any alleged incapacity. And to the extent the second prong of the *Smith* inquiry focused on the defendant's capacity or competence to waive voluntarily further legal review, the court reasoned that that question was subsumed within the *Rees* standard. The district court, therefore, refused to focus its voluntariness inquiry specifically on Walker's conditions of confinement. The issue, ruled the court, was "whether Walker's waiver was voluntary, or the result of a flawed mental state due to an overborne will."

Appellants may quarrel with the district court's approach, but we think the court did exactly what appellants

asked it to do. To begin with, to the extent the district court emphasized the concept of an "overborne will," we point out that in their Supplemental Memorandum in Support of Next-Friend Habeas Corpus Petition, appellants, in asserting that Walker's waiver decision is involuntary, stated: "A person's conduct, while otherwise rational, is not voluntary if it is based on a person's *overborn will* or impaired self-determination that results from coercion or improper influence." Thus, the district court's conclusion that "[p]etitioners, in their pleadings, limit their argument to the claim that Walker's decision to abandon his rights . . . demonstrates a flawed mental state resulting from an 'overborne will' " is quite understandable. Appellants from the outset have asserted next-friend standing by claiming that the conditions of Walker's confinement on death row "have impeded and violated Mr. Walker's *ability* to freely and voluntarily exercise his constitutional rights." They now want us to make an elusive distinction between "ability," their term, and "competence" or "capacity," the district court's terms.

Moreover, appellants' notion that Walker's conditions of confinement rendered his decision involuntary seems to fall within Dr. Barrett's and Dr. Becker's stated concepts of "overborne will," both of which the district court found properly to focus on "the voluntary nature of Walker's decision." For example, Dr. Becker focused on whether there were "psychological internal factors in [Walker] that were causing him to reach this decision *or whether there were external environmental effects of the institutionalization that might be forcing him in some way to reach this decision.*" Dr. Barrett described "overborne will" as something "that might lead a person not to be able to direct his own behavior in a logically consistent and self-serving way." Presumably this would include adverse conditions of confinement. Notably, neither expert found that any environmental factor affected Walker's capacity to make a voluntary waiver.

Finally, and most notably, Walker himself did not voice any serious concerns about the conditions of his confinement to the district court. To the contrary,

> Walker testified that he still desires not to pursue any further review of his sentence. He told the court that he had made this decision, and he had told his family of it the night before he was sentenced. He has not wavered in that decision at any time since.
> . . .
> . . . He stated that he would not change his opinion even if he were guaranteed an opportunity for pardon at age 70 or 75. He understood the federal review options available to him, and was aware of the efforts being made on his behalf by the petitioners. *He stated that it was not the lack of medical care, the conditions of his confinement, or the counseling available that were the determining factors in his decision.* . . . Walker said that there was "no possibility, hope or dream" of being a free man, and that there was no sense in being imprisoned for 10-25 years and then dying, when the end result would be the same—death.

It is not surprising, then, that the district court found that "Walker's decision is, in part, based on the quality of his life due to the fact, *not conditions*, of confinement and the sheer lack of possibility of freedom during his lifetime." (Emphasis added.) Certainly this finding is not clearly erroneous. Nor do we think the district court erred on the way to reaching this conclusion.

B.

Which brings us to appellants' second argument—that the district court erred in concluding that they lacked standing as individuals to attack the constitutionality of the Illinois death penalty statute. As the Supreme Court has described it, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," an inquiry which "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). One of those pruden-

tial limitations is that a litigant generally must assert his or her own legal rights and cannot rest a claim for relief on the legal rights or interests of third parties. *Id.* at 499.

This limitation rests upon two considerations. The first is that courts should not adjudicate the rights of third persons not parties to the litigation unnecessarily. *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). As the Supreme Court has explained, "*it may be that in fact the holders of those rights either do not wish to assert them*, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* at 113-14 (emphasis added). The second is that third parties themselves usually will be the best proponents of their own rights. *Id.* at 114. Both of these considerations, like article III's requirement of actual injury fairly traceable to the defendant's putatively illegal conduct and redressable by judicial relief, "reflect[ ] a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Of course, like all good rules, the restriction against litigants asserting the legal rights of third parties allows for exceptions when its underlying justifications are absent. Under Supreme Court teachings, two factual elements bear on this determination.

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Further, the relationship between the litigant and the third

> party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Singleton, 428 U.S. at 115. Second, and most important for purposes of this case, however,

> *is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply.* If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Id. at 115-16 (emphasis added).

Appellants' assertion of "Mr. Walker's right to challenge the validity of the Illinois death penalty statute in federal court" falls squarely within the prudential standing restriction against the assertion of third-party legal rights or interests, so appellants understandably argue that theirs is the exceptional case. They contend that, taken together, their relationship with Walker and the nature of the right they seek to assert on his behalf make it appropriate for them to press his right to seek review of the Illinois statute. Unfortunately, appellants can point to no genuine obstacle preventing Walker from asserting his own claims now that we have upheld the district court's ruling that Walker waived voluntarily further legal efforts on his behalf. Under *Singleton*, then, even if the relationship between appellants and Walker is a close one, the reasons for requiring Walker to assert his own rights still exist. Appellants, therefore, also lack standing as individuals to assert Walker's right to challenge the Illinois death penalty statute.

For these reasons, the district court's dismissal of appellants' petition is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 18, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

MIRIAM WILSON, et al., individually and as next friends acting on behalf of Charles Walker,

Petitioners-Appellants,

No. 88-2886 vs.

MICHAEL LANE, Director of the Illinois Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 88-3180—**William Stiehl**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* in the above-entitled cause filed by counsel for the petitioners-appellants, no judge in active service has requested a vote thereon, and all

of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing *en banc*.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be and the same is hereby DENIED.

APPENDIX C

[Dated April 19, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Cause No. 88-3180

MIRIAM WILSON, NADINE SCHNURSTEIN, RONALD BARROW, GLORIA ABBEY-LYLES and PATRICIA VADER, individually and as next friends acting on behalf of CHARLES WALKER,

Petitioners,

v.

MICHAEL LANE, Director of the Illinois Department of Corrections,

Respondent.

MEMORANDUM AND ORDER

STIEHL, District Judge:

INTRODUCTION

This case is before the Court on a petition for a writ of habeas corpus. Petitioners, Miriam Wilson, Nadine Schnurstein, Ronald Barrow, Gloria Abbey-Lyles and Patricia Vader, bring this action individually, and as next-friends acting on behalf of Charles Walker, an Illinois death row inmate who is scheduled for execution by lethal injection on May 10, 1988.

This Court issued an Order requiring the petitioners to supplement their pleadings as to the issues of jurisdic-

tion, standing and Walker's competency. The Court heard oral argument on those issues and took the matter under advisement to determine whether the petitioners have standing to bring this action. Walker has not joined in the petition, and in a letter to the Court has stated that he does not wish to have anyone acting on his behalf.[1]

Charles Walker pleaded guilty to two counts of murder and one count of armed robbery in the Circuit Court for St. Clair County, Illinois. He requested that a jury be impaneled to determine whether he should receive the death penalty. After hearing evidence, the jury recommended the death penalty be imposed. *People v. Walker*, 109 Ill. 2d 484, 488 N.E.2d 529, 531-34 (1985). Walker received a sentence of death on each of the murder counts and thirty years on the armed robbery count. The Illinois Supreme Court confirmed the conviction and the death sentence on December 20, 1985.

On December 27, 1985, Walker made a motion to terminate further proceedings. On February 6, 1986, the Illinois Supreme Court denied Walker's motion to terminate fur-

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[1] The text of Walker's letter dated April 6, 1988 to the Court is as follows:

Dear Sir:

In regards to the Habeas Corpus filed in my case (Cause No. 88-3180).

This is to affirm that I dont want any one speaking or acting on my behalf. Before I was sentenced I had told my sister that if I was sentenced to death, that one appeal had to be filed according to law but after that I was going to stop my appeals and ask for an execution date. the conditions on death row or anyplace else has nothing to do with my decision. The people who signed that writ has only known me the short time I've been here.

Respectfully yours.

S/ Charles T. Walker
Box 711 #76374
Menard Ill 62259

ther proceedings, and denied Walker's appointed counsel's petition for rehearing.

Walker's counsel subsequently filed a petition for writ of certiorari in the United States Supreme Court. Walker continued to oppose the action and refused to sign an affidavit in support of the motion to proceed in forma pauperis in his petition for writ of certiorari. Certiorari was denied by the Supreme Court on December 1, 1986. *Walker v. Illinois*, 107 S. Ct. 598 (1986), *reh'g denied*, 107 S. Ct. 913 (1987).

On February 19, 1987, the Illinois Supreme Court, in response to a request, remanded the case to the Circuit Court of St. Clair County for a hearing to "determine whether Charles Walker (1) is mentally competent to waive further legal actions on his behalf; (2) has made a knowing and intelligent waiver of any such further legal actions; and (3) is fit to be executed." Counsel was appointed to represent Walker, and a hearing was held on June 24, 1987.

On September 28, 1987, the Illinois Supreme Court, having found the June 24 hearing to be inadequate, issued an order requiring a rehearing in the Circuit Court of St. Clair County. The court instructed:

> The rehearing shall be in accordance with *Rees v. Peyton* (1966), 384 U.S. 312, and *Gilmore v. Utah* (1976), 429 U.S. 1012 . . . . The circuit court is further directed to consider all available evidence relevant to the court's findings of fact concerning the three questions raised for consideration.

The hearing was held in compliance with the Illinois Supreme Court's Order on November 20, 1987, and the St. Clair County Circuit Court made the following findings:

> 1. Defendant is aware of the legal recourse available to him in attacking his conviction and death sentence, including state post-conviction relief [*Ill. Rev. Stat.*, 1985, ch. 38, sec. 122-1 *et seq.*], federal habeas corpus relief (28 U.S.C. 2254 *et seq.*] and executive clemency;

2. Defendant is mentally competent to seek legal relief on his own behalf from the judgment imposed against him;

3. Defendant has mental capacity to make a rational choice concerning the continuation or abandonment of further litigation attacking his conviction and sentence [*Rees v. Payton*, 384 U.S. 312, 316 (1966)];

4. Defendant does not suffer from any physical condition which impairs his mental capacity to waive further proceedings;

5. Defendant does not suffer from terminal lung disease;

6. Defendant does not choose to be executed because he fears other inmates;

7. Defendant has made a knowing and intelligent waiver of further legal action on his behalf [*Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938)];

8. Defendant has made a knowing and intelligent waiver of counsel for the purpose of further proceedings challenging the judgment against him [*Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938)];

9. Defendant understands the nature and purpose of the death sentence to be imposed against him [*Ford v. Wainwright*, 106 S. Ct. 2595, 2603 (1986); *Ill. Rev. Stat.*, 1985, ch. 38, sec. 1005-2-3];

10. Defendant understands that the State intends to execute him by lethal injection as punishment for the crime of murder [*Ill. Rev. Stat.* 1985, ch. 38, sec. 119-5];

11. Defendant is fit to be executed.

(Hudlin, J. Order of Nov. 20, 1987, as cited in Respondent's Reply Brief at pp. 8-9.)

On January 19, 1988, the Illinois Supreme Court, upon review of the record, found "that Charles Walker is mentally competent to waive further legal actions on his be-

half; has made a knowing and intelligent waiver of any such further legal actions; and is fit to be executed." The court ordered that the death sentence be implemented on May 10, 1988.

JURISDICTION AND VENUE

Petitioners allege jurisdiction pursuant to 28 U.S.C. §§ 1343(c) and 2241. They describe the petition as consisting of two claims. In one claim, petitioners sue individually. In the other, they sue on behalf of Charles Walker as his next-friend, pursuant to 28 U.S.C. § 2242. (Application for writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by *someone acting in his behalf.*" *Id.* (emphasis added)).

This Court's habeas corpus jurisdiction extends only to actions brought by or on behalf of a person in custody; the next-friend claim may therefore come within such jurisdiction. In a next-friend action, the next-friend sues on behalf of the person in custody, who remains the real party in interest. Fed. R. Civ. P. 17. Venue over the next-friend claim properly lies in this Court because Walker was convicted in this judicial district and presently is incarcerated within the district. 28 U.S.C. § 2241(d).

Petitioners also sue in their individual capacities, thereby asserting their own interests rather than Walker's. Presumably, they intend for Walker to benefit from this assertion of their own interests. This Court's habeas corpus jurisdiction does not extend to such individual claims. A federal court has jurisdiction to hear a habeas corpus action only if it is brought by or on behalf of a person in custody to attack the legality of his confinement. 28 U.S.C. §§ 2214, 2242; the individual claims here are brought neither by Walker nor on his behalf. Petitioners also invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1343(a)(3), which would extend to petitioners' individual claims, but only to the extent that petitioners have standing to raise the claims in a civil rights action under 42

U.S.C. § 1983, for which § 1343(a)(3) is the jurisdictional counterpart. Petitioners' individual claims, therefore, must be pursued under the Civil Rights Act of 1871, 42 U.S.C. § 1983, if at all. Venue over such civil rights claims is properly in this Court, because the claims arose in this district. 28 U.S.C. § 1391(b).

EXHAUSTION OF STATE JUDICIAL REMEDIES

A federal court will not entertain a petition for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court unless all effective available state judicial remedies have been exhausted. 28 U.S.C. § 2254(b), (c). Remedies must be exhausted as to every claim raised, *Rose v. Lundy*, 455 U.S. 509 (1982), and the substance of each federal claim must be "fairly presented" as a federal claim in state court. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). The United States Supreme Court held in *Brown v. Allen*, 344 U.S. 443 (1953), that repetitious applications to state courts are not necessary, and that remedies are properly exhausted by raising all claims on direct review to the highest state court. *Id.* at 447, 449 n. 3. The Court has reviewed the published opinion and unpublished orders of the Illinois Supreme Court in this case, and concludes that all of the claims in this habeas action were presented to that court, and accordingly, the exhaustion requirements of 28 U.S.C. § 2254(b), (c) have been met.

STANDING

This action is concerned with Charles Walker's capital sentence for murder, i.e. whether it was imposed, and may be executed, constitutionally. At oral argument, petitioners made clear that they do not seek to attack the Illinois death penalty on any grounds independent of its imposition on Walker, although several petitioners may be affected by the law in other ways.

This Court is initially faced with the question of whether petitioners have standing, i.e., whether they are "entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing has two aspects. *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). The first question is jurisdictional. Article III of the Constitution limits the jurisdiction of federal courts to "cases" or "controversies." "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the Court's judgment may benefit others collaterally." *Warth*, 422 U.S. at 499. Second, to find standing, the Court must also determine whether "as a prudential matter," the petitioners "are proper proponents of the particular legal rights on which they base their suit." *Singleton*, 428 U.S. at 112. Prudential considerations will require that litigants "generally must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights and interests of third parties." *Warth*, 422 U.S. at 499. Moreover, litigants do not have standing when the asserted injury "is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Id.* These prudential considerations relate to the well-established judicial preference to avoid unnecessary constitutional adjudication. *Singleton v. Wulff*, 428 U.S. at 124 (Powell, J., concurring in part and dissenting in part); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). When these prudential requirements do not apply, a court may allow a litigant to assert the rights of third parties. *Singleton*, 428 U.S. at 114.

Three different theories of standing are suggested by petitioners' pleadings. First, they allege injury-in-fact in that Walker's execution will deprive him of their interest in continuing their friendship and association with him. Accordingly, they claim individual standing to assert Walker's rights in pursuit of their own interests (Jus Tertii standing). Second, they invoke the public interest in not letting Illinois execute a person in violation of the constitution

(Citizen standing). Finally, they sue as Walker's next-friends claiming that he is unable to sue in his own behalf (Next-friend standing).

A. JUS TERTII STANDING

Petitioners claim individual standing to raise the issue of the constitutionality of Charles Walker's capital sentence. Courts will find standing to assert the rights of a third party (jus tertii) when the injury-in-fact requirement of Art. III is met, and the justifications for the prudential policy of requiring a party to assert his own rights are absent. *Singleton*, 428 U.S. at 114. In particular, the party in court and the third party must have a sufficiently close relationship so that "the enjoyment of the [third party's] rights is inextricably bound up with the activity the litigant wishes to pursue." *Id.* The relationship must be such that the litigant will be nearly as effective as the third party in asserting the latter's rights. Finally,

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from the court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best proponent.

Id. at 116.

Petitioners claim that execution of Walker's sentence will injure them by destroying their relationship with him. Each of the petitioners has befriended Walker only since he came to "Death Row" at Menard. (In response to the Court's request, petitioners submitted individual affidavits detailing the length, nature and extent of their relationship with Walker. None of them had met him until he was placed on Menard's death row. Sr. Miriam Wilson is a member of the Illinois Coalition Against the Death Penalty (ICADP), and met Walker through her visits to Menard

in that capacity. She has visited Walker bi-monthly for 30 minutes per visit, and corresponds with him once or twice a month and has received crocheted gifts from him. Nadine Schnurstein met Walker eighteen months ago through another prisoner, and has visited with Walker on four occasions. She corresponds with him four or five times a week, and speaks with him telephonically weekly. She has received crocheted gifts from Walker, and delivered gifts for him to his mother. Ronald Barrow is a fellow inmate on death row at Menard, and has known Walker since 1985. They communicate through occasional conversations, and notes passed through guards. He has purchased some of Walker's crocheted items as gifts. Gloria Abbey-Lyles is the wife of another death row inmate, and through this relationship has known Walker for three years. She visited Walker and corresponded with him monthly until Walker stopped communicating with her when she began taking an active part in trying to stop his execution. Patricia Vader is a director of ICADP, and as such visits death row inmates, and through this activity met Walker while interning with ICADP. She visits Walker every other month for twenty minutes, and they occasionally speak on the telephone. They exchange Christmas and birthday greetings.) Each petitioner states that he or she cares for Walker as a friend, and would miss him if he were executed.

The Court is not aware of any authority to support the notion that lost friendship constitutes an injury sufficient to meet the requirements of Art. III. Some associational interests are protected by the Constitution, but these usually involve either familial relations or associations in pursuit of a First Amendment right. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (discussing "intimate association" and "expressive association." *Id.* at 618). The Court finds that the threat of lost friendship in this case is insufficient to support the finding of an injury-in-fact required for individual standing.

Moreover, the prudential limitations on jus tertii standing apply to this case. To find standing, the Court must

determine whether "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and "the relationship between the litigant and third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 115. Thus a physician may, in an action to protect his ability to perform abortions, assert the rights of his patients to have abortions. *Id.* A licensed beer vendor, who has lost the business of male customers between the ages of 18 and 20, may claim that the law discriminates invidiously against those young men by illegalizing their purchase of beer from him. *Craig v. Boren*, 429 U.S. 190, 192-97 (1976). So, too, may a professional fund raiser, who will lose the business of charities whose expenditures for fund raising have been limited, assert the unconstitutionality of the limitation as a violation of the client charities' First Amendment rights. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-59 (1984). ("Munson's interests in challenging the statute are consistent with the . . . interests of the charities it represents." *Id.*)

The relationship between petitioners and Walker, however close, fails to satisfy the prudential requirement that Walker should assert his own rights. While the rights petitioners assert on behalf of Walker implicate his interests under the Fifth, Sixth, Eighth and Fourteenth Amendments, none of these interests is affected by the threatened loss of friendship. Therefore, the inextricable link is missing.

Nor is it clear that petitioners would assert rights consistent with Walker's. Walker chooses not to attack his sentence. That choice is his to make unless he has been rendered incapable of acting in his own interests, in which case, petitioners may act as his next-friend, as discussed later in this opinion. If Walker is before the Court through a next-friend, it is unnecessary and inappropriate for anyone to assert his rights as jus tertii. *See, Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n. 44 (1977) ("Ordinarily, . . . a party would not have standing to as-

sert the rights of another, himself a party in the litigation; the third party himself can decide how best to protect his interests." *Id.*).

Finally, the last requirement for allowing jus tertii standing is absent: some "genuine obstacle" to the third party's assertion of his own rights. An obstacle that impairs the third party's decision making would make next-friend standing appropriate. Short of such an extreme impairment, the Court finds no obstacle to Walker's assertion of his own rights. Walker has written to the Court, stating that he opposes these proceedings. He could just as easily have ratified the petition if that were his choice. Considerations of privacy, *Singleton v. Wulff*, 428 U.S. at 117; *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *NAACP v. Alabama*, 357 U.S. 449, 459 (1958); imminent mootness, *Singleton*, 428 U.S. at 117; fear of prosecution, *Craig v. Boren*, 429 U.S. at 196-97; *Eisenstadt* at 446; or "chilled" expression, *Munson*, 467 U.S. at 956, do not apply here. No obstacle bars Walker from pursuing his post-conviction remedies, unless his choice to forego those remedies arises from some incapacity. "The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464, 473 (1982). (Citations omitted). If Walker has competently chosen not to assert his rights, then petitioners have no standing to assert them for him. *Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976) (Burger, C.J., concurring).

B. CITIZEN STANDING

Petitioners also allege that the "public and judicial interests in preventing the execution of an individual pursuant to an unconstitutional statute weigh heavily in favor of

allowing petitioners to challenge the Illinois death penalty statute on Mr. Walker's behalf." Their position is that even if Walker does not want to pursue his federal habeas corpus remedy, his decision to "waive" that right should not prevent the Court from hearing a matter involving public interests of the highest degree. Such rights, they claim, are not waivable, and therefore this Court should follow a number of state court decisions and hear this case whether or not Walker joins in the petition.

Petitioners may be correct in stating that a number of state courts have refused to accept a defendant's waiver of appellate remedies in capital cases under a variety of circumstances, but their arguments ignore the critical differences between those courts and this Court. First, this is a federal court, with its jurisdiction limited by the case or controversy requirement of Art. III and the necessity of an injury-in-fact to the litigant who claims standing. Second, this Court has no appellate jurisdiction over the Illinois courts, which have already heard this case. The scope of review on appeal differs from that in a habeas action, *see, e.g., Stone v. Powell*, 428 U.S. 465 (1976), and a federal habeas court has no supervisory jurisdiction over the state courts. Finally, there is nothing to stop Walker from bringing these claims to this Court's attention on his own behalf. This case differs from cases where a condemned prisoner, properly before a court, suddenly withdraws his appeal or seeks to waive a mandatory state appeal. Compare *Hammett v. Texas*, 448 U.S. 725 (1980), with *Rees v. Peyton*, 384 U.S. 312 (1966).

Petitioners, in asserting the public interest, even without an injury to themselves, essentially seek "citizen standing." Because of the public interest and the purported non-waivable nature of the habeas remedy, they assert that "it is entirely appropriate for the petitioners to have standing before this court." In *Valley Forge*, the Supreme Court considered an argument that circumstances demanded "special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself that is likely to be redressed if the requested relief is

granted.' " 454 U.S. at 488 (citations omitted). The Court responded that such an argument carried an implicit

> philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme . . . "the assumption that if respondents have no standing to sue, no one has standing, is not a reason to find standing." This view would convert standing into a requirement that must be observed only when satisfied.

Id. at 489 (citations omitted). The Court rejected the notion that "judicial power requires nothing more for its invocation than important issues and able litigants." *Id.* If Walker is unable to think and decide for himself, then others may assert his interests as next-friend. But if he is competent, Walker retains his autonomy and remains the best and only champion of his rights. The mere importance of the issues does not confer on this Court any authority to set aside a state court sentence without the presence of the only party whose rights are implicated by the execution of that sentence.

Accordingly, the Court finds that petitioners have no standing as individuals to attack the legality of Walker's capital sentence in this Court.[2]

C. NEXT-FRIEND STANDING

As a second basis for standing, petitioners bring this habeas action as "next-friends" of Charles Walker.

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[2] In making this determination, the Court expresses no opinion as to whether petitioners, in their individual capacities, have stated a claim upon which relief could be granted under the Civil Rights Act of 1871, 42 U.S.C. § 1983, or pursuant to any other legal theory.

28 U.S.C. § 2242 provides that: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" (Emphasis added). The next-friend device is infrequently used, but, under certain conditions may be useful, or even necessary. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) *cited in Weber v. Garza*, 570 F.2d 511, 513 (5th Cir. 1978). The restrictions on next-friend filings are many. The next-friend may not file if the detainee, himself, could file a petition. *Weber, id.* The number of cases which concern next-friend filing in death penalty cases are few.[3] The law that has developed from these cases has recognized that two inquiries must be made before a next-friend petition can be entertained, that is, before the parties have standing to bring the action.

The next-friend applicant must, in the petition, satisfy the following requirements. First, there must be an explanation showing "(1) why the detained person did not sign and verify the petition and (2) the relationship and interest of the would be 'next-friend.' " *Weber*, 570 F.2d at 513-14. Second, the applicants may not use the next-friend device for the unauthorized practice of law. "The 'next-friend' expedient, which on occasion may be essential to the efficacy of the 'Great Writ,' may not be so abused as to unleash on the courts a quasi-professional group of lay writers who seek to right all wrongs, both real and imagined." *Id.* at 514. Without the required showing for the

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[3] *See, e.g., Rees v. Peyton*, 384 U.S. 312 (1965); *Evans v. Bennett*, 440 U.S. 1301 (April 5, 1979) (Rehnquist, J., Opinion in Chambers); *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir. 1979), 443 U.S. 1306 (Sept. 7, 1979) (Rehnquist, J., Opinion in Chambers), 444 U.S. 807 (October 1, 1979) (Marshall, J. and Brennan, J., dissenting); *Groseclose v. Dutton*, 589 F. Supp. 362, 594 F. Supp. 949 (M.D. Tenn. 1984); *Rumbaugh v. Estelle*, 558 F. Supp. 651 (N.D. Tex. 1983); *Rumbaugh v. McKaskle*, 730 F.2d 291 (5th Cir. 1984); *Rumbaugh v. Procunier*, 753 F.2d 395, *cert. denied*, 473 U.S. 919 (1985) (Marshall, J. and Brennan, J., dissenting); *Smith v. Armontrout*, 632 F. Supp. 503 (W.D. Mo. 1986), *aff'd* 812 F.2d 1050 (8th Cir. 1987).

need to "resort to the next-friend device, the court is without jurisdiction to consider the petition." *Id.*

Because of the "obviously irreversible nature of the death penalty," this Court will resolve all doubts as to legal issues in favor of granting a stay; however, there must be authority for the Court to so act. *Evans v. Bennett*, 440 U.S. 1301, 1303-4, 1306 (April 5, 1978) (Rehnquist, J. Opinion in Chambers). Moreover, the Court is also guided by District Court Rules for the Disposition of Petitions for Habeas Corpus Brought Pursuant to 28 U.S.C. § 2254 in Cases Involving Petitioners Under a Sentence of Death, promulgated by the Seventh Circuit.

Applying the standards of the next-friend test to this case, the first prong of the initial requirement is to determine if the petitioners have adequately addressed the question "why the detained person did not sign and verify the petition . . . ." *Weber*, 570 F.2d at 513.

In their original petition, and supplement thereto, the petitioners assert next-friend standing by claiming that the conditions of Walker's confinement on death row "have impeded and violated Mr. Walker's ability to freely and voluntarily exercise his constitutional rights, including his right to pursue state post-conviction and federal habeas corpus remedies." (Next-friend petition at para. 11, pp. 6-7.)

The Supreme Court, in *Rees v. Peyton*, 384 U.S. 312 (1966), set forth the standard to be used by a reviewing court to determine whether the person has the mental capacity to choose not to pursue further appeals and collateral attacks upon his conviction and sentencing. The standard is:

> [W]hether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. at 314. Therefore, the sole determination is whether Walker has the capacity to make a rational choice in his decision to forego further review of his sentence. If his capacity is challenged, it must be, under the terms of *Rees*, challenged by a showing that Walker suffers from a "mental disease, disorder or defect." *Id.* Following the analysis of *Rees*, this Court will discuss the issue in terms of Walker's "capacity," although other courts have used the term "competency" in their reviews.

As Justice Rehnquist stated in the case concerning Jesse Bishop, *Lenhard v. Wolff*, 443 U.S. 1306, 1308 (Sept. 7, 1979) (Opinion in Chambers); "A successful attack on Bishop's competency is the requisite threshold for applicants' [next-friend] standing." This Court will, therefore, limit its review on the question of standing of these next-friends in the same manner. "[T]he initial barrier to be overcome in the present case by [the next-friend] applicants . . . is the finding of the courts which have passed on the question that defendant . . . is competent to waive the assertion of any constitutional infirmities in the sentence imposed upon him . . . ." *Id.*

The Court, therefore, rejects petitioners' assertions of next-friend standing to the extent that they rely upon the second test set out in *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987) adopted from the analysis in *Groseclose v. Dutton*, 594 F. Supp. 949 (M.D. Tenn. 1984). The Eighth Circuit in *Smith v. Armontrout* created an artificial second avenue for determining next-friend standing. In its analysis of the issue of the defendant's decision to forego further review, the court stated:

> This inquiry resolved into two questions: first, whether Smith had the capacity to appreciate his position and make a rational decision, or was suffering from a mental disease, disorder, or defect that substantially affected his capacity, *see Rees v. Payton*, 384 U.S. at 314, 86 S. Ct. at 1506; and second, whether the conditions of his confinement rendered his decision involuntary. *See Johnson v. Zerbst*, 304 U.S. 458,

> 58 S. Ct. 1019, 82 L.Ed. 1461 (1938); *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 953, 957, 961 (M.D. Tenn. 1984).

812 F.2d at 1053.

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), to which the Eighth Circuit attributes the "second" inquiry, the Court stated:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Id. at 464. *Johnson* concerned a criminal defendant's waiver of the right to counsel, not the waiver of the right to appeal or to collateral review in a death sentence case. In *Johnson* the petitioner was the inmate himself, not a next-friend. Nonetheless, the focus of *Johnson* falls squarely within the *Rees* decision. That is, whether the abandonment of further legal review was made intelligently, with full capacity.

It should be further noted that in both *Smith v. Armontrout* and *Groseclose*, the reviewing courts have based their inquiry into the defendants' lack of capacity on the "disease, disorder or defect" standard articulated in *Rees*, and were not limited to a "conditions of confinement" analysis. In *Smith v. Armontrout*, Gerald Smith was found to suffer from three conditions (borderline personality disorder; antisocial personality disorder; chronic mild-to-moderate depression) that were "mental disorders." 812 F.2d at 1055. In *Groseclose*, Ronald Harries was found to suffer from bipolar mood disorder, or "manic depressive

illness." 594 F. Supp. at 954. The Court also found that his judgment may have been impaired by his medication. 589 F. Supp. at 366.

The second inquiry of *Smith v. Armontrout*, to the extent that it may actually be a part of the capacity question, falls within the standards which the Supreme Court recognized in *Rees*. That is, was the defendant's decision to abandon further review made voluntarily. Again, the threshold for standing as next-friends is a successful attack on the capacity to make a voluntary decision. The issue of Walker's alleged incapacity, the cause of which may be the result of various factors, is the sole focus of this Court. And, therefore, the conditions of confinement are not before the Court. Consequently, the examination by this Court into the issue of standing will be directed only to Walker's mental state, not the specific cause thereof.

The petitioners have stated, both at oral argument, and in their pleadings, that they are not challenging Walker's "competence" nor arguing that his decision to abandon further legal review was not rational. It is clear to the Court that these assertions are made based on the petitioners' misplaced reliance on *Smith v. Armontrout*.

Despite these assertions, it is evident that they concede the question of "competence" to the extent that they do not assert that Walker suffers from a mental disease or defect. Petitioners, in their pleadings, limit their argument to the claim that Walker's decision to abandon his rights to further review demonstrates a flawed mental state resulting from an "overborne will." The issue of flawed mental state or overborne will is properly addressed under the capacity test set forth in *Rees*. The only remaining inquiry is whether the state court hearings addressed Walker's capacity in light of the overborne will allegation.

28 U.S.C. § 2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a

> person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> . . . .

The Court finds that the hearing held in the Circuit Court, St. Clair County, Illinois, on November 20, 1987, was insufficient to the extent that it did not address the issue of whether Walker suffered from a flawed mental state due to an overborne will. In all other respects, the state court determinations as to Walker's capacity were sufficient. Therefore, the sole issue before the Court is whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to abandon further relief involuntary.

Accordingly, the Court ORDERS that the execution of Charles T. Walker be and it hereby is STAYED pending an evidentiary hearing on the jurisdiction of this Court based on the issue of whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to abandon further relief involuntary.

To facilitate this inquiry, the Court intends to order a psychiatric/psychological evaluation of Walker by an expert appointed by the Court. Each party shall submit to the Court within seven days of this date a statement of the specific tests it wishes to have administered within the parameters of the Court's inquiry. Each party shall also have the opportunity to have its own psychiatrist or psychologist examine Walker. Each party shall provide to the Court, and opposing counsel, the curriculum vitae of its expert within seven (7) days. Discovery of the opposing expert shall be permitted upon proper application to the Court. Reports of the experts shall be filed within forty-five (45) days. A hearing will be scheduled after the Court has had an opportunity to review the reports of the examining experts.

The Clerk of the Court is directed to forward a copy of this Order to Walker.

IT IS SO ORDERED.

DATED: 19 April 1988

/s/ WILLIAM D. STIEHL
District Judge

eod 04-19-88 am

APPENDIX D

[Dated August 26, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Cause No. 88-3180

MIRIAM WILSON, NADINE SCHNURSTEIN, RONALD BARROW, GLORIA ABBEY-LYLES and PATRICIA VADER, individually and as next friends acting on behalf of CHARLES WALKER,

Petitioners,

v.

MICHAEL LANE, Director of the Illinois Department of Corrections,

Respondent.

MEMORANDUM AND ORDER

STIEHL, District Judge:

INTRODUCTION

This matter is before the Court on a petition for a writ of habeas corpus. Petitioners, Miriam Wilson, Nadine Schnurstein, Ronald Barrow, Gloria Abbey-Lyles and Patricia Vader, filed their petition individually and as next-friends acting on behalf of Charles T. Walker, an Illinois death row inmate currently incarcerated at the Menard Correctional Center, Chester, Illinois.

BACKGROUND

The Court heard oral argument on April 7, 1988, on the petition and ruled on April 19, 1988, that the petitioners could not pursue the action under either jus tertii or citizen standing doctrines. *Wilson v. Lane*, No. 88-3180, slip op. at 9-17 (S.D. Ill. April 19, 1988). The Court left unresolved the determination as to whether the petitioners have standing to pursue the action as next-friends of Walker.

Under next-friend standing, the Court ruled that petitioners must show why Walker did not sign and verify the petition, as well as the relationship and interest of the would-be next-friends. Slip op. at 18, *citing Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978). The Court restricted next-friend standing, ruling that the petitioners may not use the next-friend petition as a device for the unauthorized practice of law. This is to prevent the creation of lay advocates who seek to right all alleged wrongs. *Id.*

As prospective next-friends, the petitioners alleged that the conditions of confinement on death row have affected Walker's capacity to freely and voluntarily exercise his rights to pursue all post-sentence remedies. After a review of *Rees v. Peyton*, 384 U.S. 312 (1965), and *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir.), 443 U.S. 1306 (Rehnquist, J., Opinion in Chambers), *aff'd*, 444 U.S. 807 (1979), the Court confined the inquiry to Walker's competence or capacity to terminate his pursuit of judicial remedies. The petitioners' reliance on *Smith v. Armontrout*, 632 F. Supp. 503 (W.D. Mo. 1986), *aff'd*, 812 F.2d 1050 (8th Cir. 1987), and *Groseclose v. Dutton*, 589 F. Supp. 362, 594 F. Supp. 949 (M.D. Tenn. 1984), was found to be misplaced, and the Court determined that the actual causes of Walker's alleged incapacity were not at issue. Slip op. at 20-22. The issue of capacity or competency was further limited by the petitioners' acknowledgement that Walker does not suffer from a mental disease or disorder. Remaining at issue was whether Walker's waiver was voluntary, or the result of a flawed mental state due to an overborne will.

The Court determined that the November 20, 1987 hearing in the Circuit Court of St. Clair County, Illinois was insufficient as a matter of law, under 28 U.S.C. § 2254(d)(1), (2), (3) and (6). The Court held that the state court hearing failed to "address the issue of whether Walker suffered from a flawed mental state due to an overborne will." Further, "the sole issue before the Court is whether Walker suffers from an overborne will which substantially affects his capacity, thereby rendering his decision to abandon further relief involuntary." Slip op. at 24.

The Court stayed the scheduled execution of Walker, and determined that an evidentiary hearing would be necessary to resolve the sole issue before the Court. Addressing the question of overborne will allows the Court to determine whether there is an acceptable reason for Walker's decision not to sign the petition. The parties were granted leave to have a psychiatrist or psychologist examine Walker as to this issue. The Court appointed its own expert, Dr. Robert E. Becker, and directed him to carry out the same inquiry and make an evaluation as to whether Walker's decision to abandon further relief was voluntary. The Court also appointed counsel to represent Walker in all proceedings before the Court.

The Court held an evidentiary hearing on August 8, 1988, and took the matter under advisement. Testifying at the hearing were Curtis L. Barrett, Ph.D., petitioner's expert; Robert E. Becker, M.D.C.M., the Court's expert; and Charles T. Walker. Respondent chose not to have an expert examine Walker. Both experts filed written reports with the Court.

THE ISSUE OF VOLUNTARINESS

The inquiry before the Court concerns the voluntariness of Walker's decision. The original petition relied on the *Groseclose* decision, and attempted to frame the issue in terms that the conditions of Walker's confinement rendered any decision he made involuntary. The Court, however, refused to review the conditions, per se, and de-

termined that the threshold question was simply whether Walker's decision not to pursue further legal remedies was made voluntarily. As the Court in *Groseclose* stated, "a defendant's conduct is not voluntary if it is the result of an overborn will or the product of an impaired self-determination brought on by the exertion of any improper influences." 594 F. Supp. at 957.

In its prior Order, this Court determined that the voluntary issue would be reviewed under the capacity test set forth by the Supreme Court in *Rees v. Peyton*, 384 U.S. 312 (1966). Slip op. at 22. The *Rees* Court established the following standard:

> [W]hether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id. at 314. To that extent, the Court determined that petitioners must make a "successful attack on [Walker's] capacity to make a voluntary decision" in order to meet the threshold standing required to go forward with their petition. Slip op. at 22.

Petitioners bear the burden of proving, by a preponderance of the evidence, that Walker lacks the requisite capacity to waive further legal review. *Accord, Evans v. Bennett*, 440 U.S. 1301 (1979); *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Rees v. Peyton*, 384 U.S. 312 (1966); *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir.), *aff'd* 444 U.S. 807 (1979).

A. "OVERBORNE WILL"

The Court was presented with the evaluations of two mental health experts. Dr. Barrett determined that Walker is a chronic alcoholic who has not received successful treatment for his alcoholism. Based on this, Barrett determined that there is a "substantial probability that [Walker's] waiver of his rights to further appeal is indeed

a product of 'overborne will,' as I understand that term." Report of Dr. Barrett at pp.4-5. Dr. Becker concluded that Walker exhibited no evidence of diminished mental capacity. He found Walker to be "capable of deciding not to appeal his death sentence." Report of Dr. Becker at p.6.

Both experts testified that they were unfamiliar with the concept of "overborne will" in a medical sense. Both, however, were able to formulate definitions for this term. Dr. Barrett described overborne will as something "that might lead a person not to be able to direct his own behavior in a logically consistent and self-serving way." (Tr. p.18) Dr. Becker concluded that he had to determine whether there were "psychological internal factors in him that were causing him to reach this decision or whether there were external environmental effects of the institutionalization that might be forcing him in some way to reach this decision." (Tr. p.96). The Court is satisfied that both experts properly focused their evaluations on the voluntary nature of Walker's decision.

B. FINDINGS OF THE EXPERTS

Dr. Barrett is a clinical psychologist and Professor of Psychiatry at the University of Louisville. He is board certified and has specialized in addictive behaviors. He evaluated Walker on two consecutive days. As part of the examination, he performed a mental status examination and gave Walker a life history questionnaire, a sentence completion test and requested that Walker write a personal autobiography. Dr. Barrett stated several times that he began his evaluation of Walker with the premise that persons who are incarcerated in difficult circumstances are presumed to want to live and do not choose to die. As an example of this, Dr. Barrett discussed the will to live exhibited by prisoners of war. Dr. Barrett stated that the Vietnam POW's "kept trying to live even though subjected to horrible tortures and horrible living circumstances."

Dr. Barrett concluded that Walker suffers from chronic, untreated alcoholism, but found that Walker does not suffer from any mental disease, defect or disorder, including organic brain disorder due to acute alcoholism. Dr. Barrett found that due to the fact that Walker's alcoholism has remained untreated, he suffers from a "self-will run riot." Dr. Barrett determined that there was a "substantial probability" that Walker's decision not to challenge his death sentence is based on the effects of his untreated alcoholism, and that this impinges on the voluntary nature of his waiver. Walker's decision was characterized as one made in a "logic-tight" compartment. That is, Walker is impervious to input from external sources. Dr. Barrett found Walker to exhibit grandiose perceptions.

Dr. Barrett based his diagnosis of chronic alcoholism on the diagnostic scale set forth in the DSM-IIIR. He found that Walker had had a drinking problem from an early age, and under the MacAndrews scale on the Minnesota Multiphasic Personality Inventory (MMPI), is properly categorized as an alcoholic. Dr. Barrett stated that Walker may suffer from a personality disorder; however, it is so entwined with his alcoholism that it could not be diagnosed without treatment. It was his opinion that only after successful therapy would Walker move away from the "logic-tight" thinking and exhibit a more rational thought process about his decision to waive further review. A minimum of one year's therapy would be necessary before a determination could be made by any expert as to the voluntary nature of Walker's decision.

Dr. Becker is Professor and Chairman of the Department of Psychiatry, Southern Illinois University at Springfield, Illinois. He is board certified in psychiatry, and has an extensive publication history in that field. Dr. Becker examined Walker, as well as Gary Knop, guard captain for the detention unit, and David Elam, Walker's counselor. He concluded that Walker suffers from an antisocial personality disorder. Dr. Becker conducted a mental status examination on Walker and found no evidence of impairment of either memory or intelligence. He found Walker

to have a skewed thought process, which is in keeping with a diagnosis of antisocial personality disorder. Dr. Becker observed Walker to be matter-of-fact in his attitudes and definite in the expression of his opinions. Walker evidenced no depression or grandiose behavior. He determined that Walker was neither an acute nor chronic alcoholic. This finding was based on the fact that Walker has not used alcohol for the past five years, and has had long periods, when not incarcerated, when he chose not to use alcohol.

Dr. Becker agrees with Dr. Barrett that some of Walker's characteristics are common among alcoholics, and that he could be labeled by the DSM-IIIR under the substance abuse category. He found, however, that Walker's use of alcohol is related to his antisocial personality. Dr. Becker agreed that Walker clearly abuses alcohol. However, Walker's characteristics did not all meet a diagnosis of alcoholism. He found that an antisocial personality disorder diagnosis was the best explanation for the following: Walker's pattern of behavior, his functioning as an individual, and his method of selecting his courses of action. Dr. Becker found no evidence of dependence on alcohol, psychologically or physiologically, and determined that Walker used alcohol as a convenient way of dealing with his feelings when he found himself in certain situations. Dr. Becker stated: "Antisocial people use everything the way they want. They use their bodies and other people the way they want. The alcohol abuse is the general way he views life; Charles Walker first and the chips where they fall later for other people." (Tr. p.129).

Dr. Becker found Walker to be mentally capable of making his own decisions. He found no evidence of alcoholism nor of conditions of confinement that would interfere with Walker's ability to voluntarily waive his right to further review of his death sentence. Dr. Becker stated that there was no nexus between being an alcoholic or substance abuser and an ability to waive rights. He found this to be true as it applied to both the general population and to Walker.

FINDINGS AND CONCLUSIONS

The Court initially notes that Walker's behavior and decision-making process which Dr. Barrett considers to be the result of chronic alcoholism could also be the result of an antisocial personality, as Dr. Becker states. Whether termed "self-will run riot" or a "logic-tight compartment," one does not have to be a chronic alcoholic to exhibit the behavior described in these phrases.

Dr. Becker's report offers a more reasonable explanation of Walker's actions, and the Court finds Dr. Becker to be the more credible expert. Simply put, Walker has an antisocial personality, and makes decisions consistent with that personality. His lack of regard for advice of attorneys, for instance, although potentially viewed as "self-will run riot," is more likely the characteristic of an individual who simply has a lack of regard for any other persons' opinions or needs. Walker's matter-of-fact description of the murders he committed shows that he places little value on human life, as does his relative lack of remorse over the killings. His failure to distinguish between guilt in his mind and guilt under the law cannot be considered the result of a flawed mental state, per se. It simply shows that Walker considers his actions in terms of his needs, without regard for their propriety in the eyes of the law.

Furthermore, to accept Dr. Barrett's conclusion would be to place any waiver made by a potential alcoholic in question. This would include waiver of right to trial by jury, waiver of Miranda rights, or the waiver of the right to an appeal.

This Court determined in its prior opinion that, other than the issue of a potentially overborne will, the state court determinations of Walker's capacity were sufficient. Included in the state court determinations was the finding that Walker knowingly waived his right to a jury trial. The state court proceedings also included extensive testimony concerning Walker's use of alcohol. The experts concluded that his use of alcohol did not affect his waiver

of his right to a jury trial or his right to further review. *See*, Tr. Nov. 20, 1987 Hearing (Dr. Shuman, p.18; Dr. Cuneo, p.59, Dr. Taliana pp.85-86). The court, after review of the testimony concerning the use of alcohol, found Walker competent to waive his rights to further review and fit to be executed. Therefore, the issue of acute alcoholism was competently covered by the state court, and, pursuant to 28 U.S.C. § 2254, is not before this Court.

The Court had the opportunity to examine Walker on the stand at the August 8th hearing. Walker testified that he still desires not to pursue any further review of his sentence. He told the Court that he had made this decision, and had told his family of it on the night before he was sentenced. He has not wavered in that decision at any time since.

The Court found him to be credible, lucid, and rational in his testimony. He stated that he would not change his opinion even if he were guaranteed an opportunity for pardon at age 70 or 75. He understood the federal review options available to him, and was aware of the efforts being made on his behalf by the petitioners. He stated that it was not the lack of medical care, the conditions of his confinement, or the counseling available that were the determining factors in his decision. He drew a very perceptive distinction between his situation and that of POW's. He stated, "They [POW's] can have a hope and a dream of being free. I can't. See, so it's two different sets of circumstances." (Tr. p.155). Walker said that there was "no possibility, hope or dream" of being a free man, and that there was no sense in being imprisoned for 10-25 years and then dying, when the end result would be the same—death.

CONCLUSION

The Court finds that petitioners' original basis for their petition, that the conditions of confinement have caused Walker's will to be overborne, rendering his decision involuntary, is without merit. Neither expert found any environmental factor that affected Walker's capacity to make

a voluntary waiver. Walker himself did not have any serious complaints about the conditions of confinement. The Court finds that Walker's decision is, in part, based on the quality of his life due to the fact, not conditions, of confinement and the sheer lack of the possibility of freedom during his lifetime. He expressed a reasoned, logical and acceptable desire not to lay in a "cage" and die an old man in that "cage."

Having considered the opinions of the medical experts together with Walker's testimony, the Court finds that the petitioners have failed to prove by a preponderance of the evidence that Charles T. Walker suffers from a flawed mental state due to an overborne will. Walker's waiver of the right to further review was made freely and rationally. Under the totality of the circumstances, Walker's decision is the product of both rational intellect and unconstrained will. *Accord, Haynes v. Washington*, 373 U.S. 503 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961). The Court further finds that Charles T. Walker has the capacity to knowingly waive his right to further review of his death sentence, and the same is done voluntarily. *Rees v. Peyton*, 384 U.S. at 314.

Accordingly, the petition for a writ of habeas corpus is DENIED and this cause of action is, therefore, dismissed. The stay of execution heretofore ordered by the Court is continued in full force and effect pending appeal.

IT IS SO ORDERED.

DATED: 26 August 1988

/s/ WILLIAM D. STIEHL
District Judge

eod 8-26-88 sms